Supreme Court, U.S.
FILED

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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

LEOCADE LEIGHTON,
Petitioner

v.

VIRGINIA DEPARTMENT OF HEALTH,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner

**Counsel of Record*

37 pp

QUESTION PRESENTED

Whether Leighton has been deprived of a property interest without due process of law, in violation of the Fourteenth Amendment, because the Court of Appeals of Virginia held that, under the Virginia Administrative Process Act, she was not "aggrieved" by a decision of the Virginia Department of Health affecting her ownership of real property and thus denied her judicial review.

PARTIES TO PROCEEDING

The parties to the proceeding are Leocade Leighton (hereinafter "Leighton") and the Virginia Department of Health (hereinafter "Department").

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OPINIONS BELOW

The Order of the Supreme Court of Virginia denying a Petition for Appeal is printed in the Appendix ("App.") at App. 1a. The Opinion of the Court of Appeals of Virginia is unpublished and is at App. 2a. The final Order of the Circuit Court of Fauquier County is not reported and is at App. 10a. The Memorandum Opinion of the Circuit Court of Fauquier County is not reported and is at App. 13a.

JURISDICTION

The Supreme Court of Virginia denied the Petition for Appeal on October 23, 2002. On January 16, 2003, the Chief Justice extended the time to file this petition until February 20, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISION

U.S. Const., Amend. 14: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

On January 14, 2000, Leighton filed a Petition for Appeal in the Circuit Court of Fauquier County, Virginia from a decision of the Department with respect to the interpretation and application of its regulations. On January 11, 2001, Judge Thomas D. Horne of the Circuit Court of Fauquier County issued a Memorandum Opinion finding that Leighton had standing, modifying the Department's decision in part, affirming the Department's decision in part, but declining to enforce the court's interpretation of the Department's regulations. App. 13a, 15a-16a. On April 19, 2001, Judge Horne issued a final

Order dismissing the appeal. App. 10a. Leighton timely appealed to the Court of Appeals of Virginia, which, in an unpublished opinion of June 11, 2002, affirmed the dismissal, but for different reasons. App. 2a, 3a. In particular, the Court of Appeals held that Leighton was not a party "aggrieved" within the meaning of the Virginia Administrative Process Act (VAPA), Code § 9-6.14:1 through § 9-6.14:25.[1] App. 9a. Leighton timely appealed to the Supreme Court of Virginia, which refused her Petition for Appeal by order of October 23, 2002. App. 1a.

Statement of Facts

In or about 1970, Leighton purchased, and has owned since, a single lot of real property in Fauquier County, Virginia. The property was described in the deed by reference to a plat and is one of five (5) properties on the plat. In or about 1990, in other litigation to which Leighton was party, *Leighton* v. *Board of Supervisors of Fauquier County*, Chancery No. 7902, the Circuit Court of Fauquier County determined that the plat was unlawful, and thus void, because it had been approved in violation of a county subdivision ordinance. The circuit court also found that, because the plat was void, Leighton's property would be unmarketable as clear title could not be given. Leighton, the other four property owners, and the Defendant Board of Supervisors agreed that the five property owners would apply to the County for resubdivision of the land to cure the problems with the plat.

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[1] Effective October 1, 2001, the VAPA was recodified in Code § 2.2-4000 through § 2.2-4033.

In preparing to obtain approval from the County of a new subdivision plat, it was discovered that the sewage disposal system on one of the other lots (the Gibson lot) could adversely affect such approval. Leighton thus requested both an informal and adjudicatory hearing before the Department. She asserted in her hearing request that the original Department permit approving a drainfield on the Gibson lot violated the Department's regulations in that the drainfield was too near the well and that there was a shed built on the drainfield. She also asserted that the boundary line proposed for the Gibson lot would encroach upon the minimum set-back provided for in the Department's regulations.

An informal hearing was held on October 27, 1999 before Dr. James E. Burns, M.D., the District Health Director, who concluded, in a written decision dated November 22, 1999, that there was no violation of the Department's regulations either with respect to the location of the drainfield relative to the well or with respect to the shed built on the drainfield. With respect to the set-back for the drainfield, the District Health Director concluded that the issue was moot as there was no property line then extant (due to the voiding of the plat).

Leighton timely filed a Petition for Appeal in the Circuit Court of Fauquier County, Virginia from the decision of the Department on January 14, 2000. The Department demurred to Leighton's Petition, arguing that she did not have standing to appeal to the circuit court, that she was not a party to the original permit approving the drainfield, that she was not an aggrieved party within the meaning of the VAPA and thus had no standing to initiate an administrative appeal, and that she was not an "aggrieved owner" under the regulations and thus had no

standing to circuit court review. The Department also contended that it had correctly decided the issues on the merits.

On January 11, 2001, Judge Horne issued a Memorandum Opinion finding that Leighton had standing, modifying the Department's decision in part, affirming the Department's decision in part, but declining to enforce the court's interpretation of the Department's regulations. App. 15a-16a. In particular, the court held that Leighton had standing because the court had previously:

> found that the subdivision in which Ms. Leighton, the Gibsons and other residents was void in its inception. . . .
>
> Although Ms. Leighton is not the owner of the lot and parcel occupied by Mr. And Mrs. Gibson, she is a person affected by the proper application of the health department regulations with respect to the siting of the drainfield. A failure to comply with applicable subdivision regulations does not prevent, ". . . the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument." Va. Code Ann. § 15.2-2254(3). However, a failure to properly subdivide the parcel may impede future plat approval and places significant limitations on the use of the property by the owner. *Leake, et al.* v. *Casati, et. al.*, 234 Va. 646 (1988). . . .

> [Ms. Leighton's] use and enjoyment of her property is limited by the need for the approval of a subdivision that conforms to county requirements.

App. 15a.

On the merits, the circuit court stated:

> The Court finds that the provisions of the regulations in effect at the time the drainfield was approved control the locating of the well on the Gibson's property. It matters not whether the digging of the well preceded or followed the construction of the drainfield. To the extent the commissioner's finding differ from that of the Court's, it is so modified. When the drainfield was the constructed, there had been no special exception cited to the regulation in effect, that would support a variance upon a showing of an absence of evidence of a threat to public health or the environment. Similarly, the grandfather provisions of a later regulation cannot be used to give perpetual existence to an activity, where the life of the permit sought to be continued is specifically limited in time.

App. 16a.

Nonetheless, the circuit court held that it would:

> affirm the remaining findings of Dr. Burns. This

> Court may not compel the Health Department to commence proceedings against the Gibson's or the original applicant, and declines to do so. Similarly, this Court finds that the enforcement of the regulations is a matter resting within the sound discretion of the Health Department. Although this Court may exercise oversight of this case, it may not subdivide the property and will not mandate the steps required to obtain subdivision approval.

App. 16a.

On April 19, 2001, Judge Horne issued a final Order incorporating the findings of the Memorandum Opinion and dismissing the appeal. App. 11a. Leighton timely appealed to the Court of Appeals of Virginia, which, in an unpublished opinion of June 11, 2002, affirmed the dismissal, but for different reasons. App. 2a, 3a. In particular, the Court of Appeals held that Leighton was not a party aggrieved within the meaning of the VAPA because:

> Leighton established no "direct," "immediate, pecuniary, and substantial interest" in the Department's decision. The effect, if any, of Gibson's existing sewage system upon a forthcoming resubdivision plat is clearly speculative and conjectural and, thus, "remote or indirect" with respect to Leighton.

App. 9a.

Leighton timely appealed to the Supreme Court of Virginia, which refused her Petition for Appeal by order of October 23, 2002. App. 1a.

ARGUMENT

THE COURT OF APPEALS OF VIRGINIA DEPRIVED LEIGHTON OF A PROPERTY INTEREST WITHOUT DUE PROCESS OF LAW

The Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Leighton has a property interest in her real property of which she has been deprived without due process of law.

Property Interest: As discussed above, the plat on which Leighton's property was described was unlawful, and thus void, because it had been approved in violation of a county subdivision ordinance. Due to the invalidation of the plat which included Leighton's property, she is unable to market her property and has thus been deprived of a property interest.

This Court has long recognized that "the right to sell property as just one element of the owner's property interest." *Keystone Bituminous Coal Assn v. DeBenedictis,* 480 U.S. 470, 500 (1987).

Leighton's inability to sell her property arises from state law. In particular, Virginia Code § 15.2-2254(3) provides in relevant part:

> No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein . . . .

Moreover, Virginia Code § 55-48 requires that a deed "describe the property . . . ." A deed description is sufficient "if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey." *Midkiff v. Glass*, 139 Va. 218, 225 (1924). A "'description of land as a numbered lot or block on a certain plat is sufficiently definite . . . .'" *Matney v. Cedar Land Farms*, 216 Va. 932, 936 (1976). As Leighton's property is described in a plat and that plat is void, Leighton's property cannot be sold or transferred and she is deprived of property interest by state law.

Process Which Is Due: As Leighton has been deprived of a property interest by state law, she must be accorded due process to challenge that deprivation. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

The judgment of the Court of Appeals of Virginia affirming the dismissal of Leighton's petition for judicial review of the decision of the Department has denied Leighton the opportunity to present her case and have its merits fairly judged.[2] In particular, by holding that Leighton was not

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[2] Although the Circuit Court of Fauquier County had accorded Leighton a proper forum, the action of the Court of Appeals of Virginia deprived her of that forum and invalidated the relief she had obtained.

aggrieved, the Court of Appeals of Virginia denied Leighton a judicial forum in which she could present her contentions that the Department had misapplied its regulations. The Court of Appeals of Virginia has thus decided an important federal question in a way that conflicts with relevant decisions of this Court.

In *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233 (1944), this Court held that the process due in a procedure affecting property interests:

> must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case.

321 U.S. at 246.

Similarly, in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950), this Court held that the Due Process Clause requires a "hearing appropriate to the nature of the case." Moreover, the Due Process Clause requires an opportunity for a hearing "which must be granted . . . in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In the case at bar, the issues at the informal hearing concerned the proper interpretation of the Department's regulations. The District Health Director who held the hearing was a medical doctor. The hearing, moreover, was informal. Thus, while the hearing may have been appropriate for the

development of a factual record, it was not appropriate for the final resolution of the legal issues which were at the heart of the case. Only a judicial forum could meaningfully provide a proper forum for the resolution of those issues.

This Court has previously addressed whether the Due Process Clause requires judicial review. In *Anderson Nat. Bank*, *supra*, this Court held:

> [I]t is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be *exclusively* by judicial proceeding. Statutory proceedings affecting property rights, which, *by later resort to the courts*, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. Familiar examples are the decisions and orders of administrative agencies which determine rights subject to a subsequent judicial review.

321 U.S. at 246-47 (emphasis added).

Thus, when property rights are affected, resort to the courts must be allowed, if not *ab initio*, at least following an administrative determination.

In contemporaneous case, *Yakus* v. *United States*, 321 U.S. 414 (1944), this Court observed:

> There is no constitutional requirement that that test be made in one tribunal rather than in

> another, *so long as there is an opportunity to be heard and for judicial review* which satisfies the demands of due process, as is the case here.

321 U.S. at 444 (emphasis added).[3]

In *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950), the Court held:

> It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing *and a judicial determination*.

339 U.S. at 599 (emphasis added).

Thus, judicial review is a necessary requirement of the Due Process Clause, a conclusion which is especially true where the issues to be resolved are legal questions.

In the instant case, while Leighton was initially accorded judicial review when the circuit court determined she had standing, the decision of the Court of Appeals of Virginia deprived her of that forum. Had the Court of Appeals of Virginia not concluded that Leighton was not aggrieved, that court would have addressed the merits of the legal issues raised on the appeal. By concluding that Leighton was not

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[3] See also *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001)("[I]f California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process.").

"aggrieved," the Court of Appeals of Virginia deprived Leighton of a property interest without due process of law.

CONCLUSION

Because the Court of Appeals of Virginia has decided an important federal question in a way that conflicts with relevant decisions of this Court, this Court should grant this petition for a writ of certiorari to review the judgment of the Court of Appeals of Virginia.

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Counsel for Petitioner

*Counsel of Record

February, 2003

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 23rd day of October, 2002.

Leocade Leighton, Appellant,

against Record No. 021648
Court of Appeals No. 1328-01-4

Virginia Department of Health, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: (Signature)

Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Elder, Bray and Annunziata
Argued at Richmond, Virginia

LEOCADE LEIGHTON

v. Record No. 1328-01-4

VIRGINIA DEPARTMENT OF HEALTH,
NICHOLAS F. GLOWICKI,
MICHELE A. GLOWICKI AND
PHILIP C. GIBSON

MEMORANDUM OPINION* BY
JUDGE RICHARD S. BRAY
JUNE 11, 2002

FROM THE CIRCUIT COURT OF FAUQUIER COUNTY
THOMAS D. HORNE, JUDGE

Leocade Leighton, pro se (John W. Wine, on briefs), for appellant.

Karen L. Lebo, Assistant Attorney General (Randolph A. Beales, Attorney General, on brief), for appellee Virginia Department of Health.

No brief or argument for appellees Nicholas F. Glowicki, Michele A. Glowicki and Philip C. Gibson.

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* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

Pursuant to the Virginia Administrative Process Act (VAPA), Code § 9-6.14:1 through 9-6.14:25,[1] Leocade Leighton appealed to the trial court a decision by the Virginia Department of Health (Department) finding no "illegalities" in the "Sewage Disposal System" that serves the property of Philip and Linda Gibson (Gibson). Demurring to the appeal, the Department maintained Leighton lacked standing because the decision was not a final "case decision" and Leighton was neither a "party" to the proceedings nor "aggrieved" by the decision. The trial court concluded Leighton had standing to seek judicial relief but, upon review of the record, affirmed the Department on the merits.

We find Leighton was not a "party aggrieved" as contemplated by the VAPA and, therefore, lacked the requisite standing to challenge the decision. Accordingly, we affirm the trial court.[2]

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[1] Effective October 1, 2001, the Virginia Administrative Process Act was recodified in Code §§ 2.2-4000 through 2.2-4033. See 1999 Va. Acts, ch. 844. All references in this opinion are to the former Code, in effect at the time the Department's decision was rendered in this case.

[2] Despite the erroneous finding by the trial court that Leighton had standing to challenge the Department's decision, we may, nevertheless, affirm the decision if the court reached the right result, albeit for the wrong reason, provided the correct reason was "brought to the attention" of the court, Eason v. Eason, 204 Va. 347, 352, 131 S.E.2d 280, 283 (1963), and no "'further factual resolution is needed before [such] reason may be assigned to support the . . . decision.'" Twardy v. Twardy, 14 Va. App. 651, 657, 419 S.E. 2d 848, 851 (1992) (quoting Driscoll v. Commonwealth, 14 Va. App.

The parties are fully conversant with the record, and this memorandum opinion recites only those facts necessary to a disposition of the appeal. In accordance with well established principles, we view the evidence in the light most favorable to the prevailing party below, the Department in this instance. See R.G. Moore Bldg. Corp. v. Mullins, 10 Va. App. 211, 212, 390 S.E.2d 788, 789 (1990).

I.

The instant proceedings resulted from unrelated litigation that necessitated resubdivision of certain separate properties of Leighton, Gibson and others. Alleging that approval by Fauquier County (County) of the replat was jeopardized by the "Sewage Disposal System" presently located on the Gibson parcel, Leighton, by letter dated September 24, 1999, requested the Department conduct a "hearing" to address the issue. She specifically challenged, inter alia, the "legality of the 10/4/1972 and 10/5/1972 approval" of the Gibson "sewage system," the location of a "a shed" and "water well" on the Gibson property and the "methods used by the Fauquier County Health Department for locating . . . drainfield[s]."

On October 27, 1999, the Department, acting through Dr. James E. Burns, Director of the Rappahannock-Rapidan Health District, conducted a hearing in response to Leighton's concerns. Charles Shepherd, District Environmental Health Manager, summarized the protracted history of the dispute, and submitted substantial documentary proofs and related evidence in support of a finding that the Gibson system did not violate applicable regulations.

449, 452, 417 S.E.2d 312, 314 (1992)).

Leighton attended the hearing but presented no evidence in support of her claims. After simply reading into the record a written statement that mirrored her original correspondence to the Department, she repeatedly refused to answer Dr. Burns' relevant inquiries.

In correspondence to Leighton dated November 22, 1999 and designated, "Case Decision," Dr. Burns reviewed the record in detail and, "[b]ased on the regulations and state law, exhibits, and proceedings held on October 27, 1999," concluded:

> 1. [T]he Gibson's drainfield permit is valid because:
>
> a. Legal property lines do not currently exist so there can be no encroachment;
>
> b. The alleged separation between the Gibson drainfield and well does not violate the 1971 Sewage Regulations which apply; and
>
> c. Even if such violation alleged by you did exist, and I expressly have determined there are no violations, you have neither identified any injury nor provided any proof establishing that there has been any injury to yourself or to the public health.
>
> 2. [T]he Gibson's well was legally installed at a time when there were no regulations that dictated a minimum separation distance between a well and a preexisting septic system. Since the well appears to have been installed after the drainfield, no violation of the 1971 Sewage

> Regulations existed then or now. The fact that some 27 years after installation the Gibson's well remains uncontaminated is good evidence that no public health hazard exists.
>
> 3. [T]he shed poses no violation of code, regulation, or ordinance and does not pose a public health threat. After 27 years the soils of the drainfield area have compacted sufficiently so that a shed resting on the surface would pose no threat to the integrity of the system.
>
> * * * * * * *
>
> 5. Finally, while you may obtain an informal explanation of the Health Department's decision making, you clearly lack standing to administratively appeal decision by the department under the 1988 Sewage Regulations
> . . . .

Pursuant to the VAPA, Leighton petitioned the trial court for review, assigning a myriad of errors to the decision. In response, the Department demurred, asserting, in pertinent part, that Leighton lacked the requisite "standing" to pursue judicial relief. At a related hearing on August 10, 2000, Leighton conceded, "If [she] had no standing, that would be the end of it." However, she alleged a "legitimate interest in the Gibson's lot since the day [the court] ordered" the resubdivision, which "put [] [her] on the same plat with the Gibson's, [and gave her] a wholesale, strong interest in . . . all parts of that plat."

At the conclusion of the hearing, the court overruled the demurrer, determining Leighton had standing to pursue the

appeal. However, in a memorandum opinion dated January 11, 2001, the court declined to "compel the Health Department to commence proceedings against the Gibsons" and ruled "enforcement of the regulations is a matter resting within the sound discretion of the Health Department." The final order, entered April 19, 2001, "incorporated" the memorandum opinion and dismissed Leighton's petition, resulting in the instant appeal.

II.

As a threshold issue, we address the Department's continuing challenge to Leighton's standing to pursue judicial relief.

> "Not every person who files a protest and is given an opportunity to be heard by the administrative agency has a right to appeal from an order of the agency, but whether a particular person has the right to contest administrative action is largely a question of law, dependent on a number of variable factors, including the nature and extent of his interest, the character of the administrative act and the terms of the statute."

D'Alessio v. Lukhard, 5 Va. App. 404, 407, 363 S.E.2d 715, 717 (1988) (quoting 73A C.J.S. Public Administrative Bodies and Procedure § 189 (1983)).

The VAPA provides, in pertinent part, that

> [a]ny person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision . . . shall have a right to direct

> review thereof by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia.

Code § 9-6.14:16(A) (emphasis added). Leighton does not challenge "the unlawfulness of any regulation" and, therefore, appeals as a "party aggrieved by and claiming unlawfulness of a case decision." Id.

Assuming, without deciding, that Dr. Burns' correspondence to Leighton, dated November 22, 1999, constituted a "case decision" by the Department and, further, that Leighton was a "party" to the proceedings, we find she has failed to establish she was "aggrieved" by the action.

> The term "aggrieved" has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be "aggrieved," it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest . . . ." The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Virginia Beach Beautification Comm'n v. Bd. of Zoning

Appeals, 231 Va. 415, 419-20, 344 S.E. 2d 899, 903 (1986) (citations omitted); see also Virginia Employment Comm'n v. City of Virginia Beach, 222 Va. 728, 732, 284 S.E.2d 595, 597 (1981); Virginia Ass'n of Ins. Agents v. Commonwealth, 201 Va. 249, 253, 110 S.E.2d 223, 226 (1959); Nicholas v. Lawrence, 161 Va. 589, 593, 171 S.E. 673, 674 (1933).

Here, Leighton established no "direct," "immediate, pecuniary, and substantial interest" in the Department's decision. The effect, if any, of Gibson's existing sewage system upon a forthcoming resubdivision plat is clearly speculative and conjectural and, thus, "remote or indirect" with respect to Leighton. Accordingly, she is not a "party aggrieved" within the intendment of Code § 9-6.14:16(A) and without standing to appeal the Department's decision.

We, therefore, affirm the trial court.

Affirmed.

Virginia:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

LEOCADE LEIGHTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 061-CH 12-00
THE VIRGINIA	)	
DEPARTMENT OF	)	
HEALTH, ET AL.,	)	
	)	
Respondents.	)	

ORDER

On November 9, 2000, Petitioner Leocade Leighton, *pro se*, and the Virginia Department of Health, by counsel, appeared before the Court, Leighton in person and the Department of Health via telephone conference call, for the purpose of presenting argument addressing the merits of this administrative appeal. Leighton submitted, and the Court accepted, Leighton's written argument entitled "Statement by Appellant at Hearing of November 9, 2000 in CH 00-12 as to Faults in the Agency Record Filed by Ms. Lebo July 29, 2000." The Department of Health objected to this filing and those objections were duly noted by the Court and recorded by a court reporter whose hearing transcript was made a part of this record.

After receiving argument and clarification from the parties present concerning the Agency Record filed by the Department of Health, the Court directed the parties to file within no later than November 19, 1999 memoranda addressing

whether this court should affirm, modify or reverse the November 22, 1999 case decision rendered Dr. James Burns, Director of the Rappahannock/Rapidan Health District. The court has reviewed the various motions and pleadings submitted by Leighton and the Department of Health, and hereby ORDERS that:

(1) the Department of Health's Motion for leave to File an Answer is GRANTED and the Answer is hereby filed;

(2) Leighton's motion for default judgment is DENIED;

(3) the Department of Health's motion to strike Leighton's November 28, 1999 memorandum is DENIED;

(4) Leighton's Motion for Leave to Amend the Petition for Appeal is DENIED;

(5) The findings contained in the Memorandum Opinion are incorporated herein and are to be read as part of this order.

(6) the appeal is dismissed and except as otherwise modified the findings of the Health Department are affirmed.

The Court finds that the provisions of the *Sewage Handling and Disposal Regulations* in effect at the time the Gibson's drainfield was approved are controlling.

The Court

There being nothing further to do in this matter, it is

Ordered the clerk to close this matter and place it among the ended matters.

It is so ORDERED.

The Court shall dispense with endorsements of remaining parties pursuant to Rule 1:13.

19 April 2001
Date

(Signature)
Judge, Fauquier Circuit Court

I ask for this:

(Signature)
Karen L. Lebo
Assistant Attorney General
Counsel for the Virginia Department of Health

Ms. Leighton & Counsel may note objections within 10 days of this Order.

Rule 1:13

A Copy Teste: Gail H. Barb, Clerk

By (Signature) Deputy Clerk
Patty Sonnleitner
Fauquier Co. Circuit Court, Virginia

VIRGINIA:
IN THE CIRCUIT COURT OF FAUQUIER COUNTY

LEOCADE LEIGHTON	)	
	)	
Petitioner	)	
	)	
v.	)	Chancery No. 00-12
	)	
VIRGINIA DEPARTMENT OF HEALTH	)	
	)	
	)	
Respondent	)	

MEMORANDUM OPINION

This is an appeal of a case decision pursuant to the provisions of the Administrative Process Act, Va. Code Ann. § 9-6.14:16. Petitioner, Leocade Leighton asserts that the Director of the Rappahannock-Rapidan Health District erred in his decision after an informal hearing. Va. Code Ann. §9-6.14:11, Ms. Leighton's appeal to this Court is subject to the limited review provided by Va. Code Ann. § 9-6.14:16. In order to prevail, the petitioner must demonstrate that the Director erred as a matter of law. Va. Code Ann. §9-6.14:17. The instant appeal is not a trial de novo.

Judicial review is limited to a determination of "(1) whether the Department acted in accordance with law; (2) whether the Department made a procedural error which was not harmless error; and (3) whether the agency had sufficient evidential support for its findings of fact." Johnston-Willis Ltd. v. Kenley, 6 Va. App. 231, 242 (1988). Additionally, the Director determined that the petitioner lacked standing to administratively appeal decisions by the Department. Ms. Leighton challenges this finding as well.

The instant appeal arises out of litigation that has proceeded for over a decade on the docket of this Court. Ms. Leighton successfully challenged the validity of governmental approvals of the subdivision in which she resides in Fauquier County, Virginia. As a result of that challenge, it has been necessary for those whose lots comprise the illegal subdivision to resubmit a new subdivision plat for approval by the county. No such approval has been forthcoming.

While awaiting subdivision approval, the Court has maintained oversight of a variety of issues affecting the original subdivision and subsequent improvement of the parcel. Among those matters considered by the Court have been those of drainage, easements, and permits. No new plat has yet to be approved.

In the course of this litigation, the petitioner has articulated a variety of concerns respecting maters that may adversely affect the approval of a new plat. One such concern involved a drainfield and well on one of the parcels within the subdivision that is presently owned by Philip C. and Linda M. Gibson.

By letter dated September 24, 1999, Ms. Leighton requested both an informal and adjudicatory hearing before the Department pursuant to the Health Department Regulations. She asserted in her request for the hearing and in the instant appeal that the original approval for a drainfield on the Gibson property was flawed. The drainfields placement too near to the well violated then existing Health Department regulations. Additionally, she contends that the boundary line proposed for the Gibson's lot would encroach upon the minimum set-back provided in the regulations of the Health Department. Lastly, Ms. Leighton pointed out that a shed has been placed on the drainfield contrary to Health Department Regulations.

Ordinarily, a neighbor would not have standing to complain about the validity of the governmental approval of the construction plans for his neighbors' drainfield. However, this is no ordinary case. Many years ago, this Court found that the subdivision in which Ms. Leighton, the Gibsons and other residents was void in its inception. While Ms. Leighton, her neighbors, the developer, and the county have struggled to correct this problem, the Court has maintained an oversight role and has ruled upon various matters that affect the subdivision process. However, as the Court has previously noted, it cannot subdivide the property for the parties.

Although Ms. Leighton is not the owner of the lot and parcel occupied by Mr. and Mrs. Gibson, she is a person affected by the proper application of the health department regulations with respect to the siting of the drainfield. A failure to comply with applicable subdivision regulations does not prevent, ". . . the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument." Va. Code Ann. § 15.2-2254(3). However, a failure to properly subdivide the parcel may impede future plat approval and places significant limitations on the use of the property by the owner. Leake, et al. V. Casati, et. al., 234 Va. 646 (1988).

This is an appeal from the decision arising out of an informal hearing. Ms. Leighton was entitled to such a hearing and to a review of the record by this Court as an aggrieved person. Her use and enjoyment of her property is limited by the need for the approval of a subdivision that conforms to county requirements. Where the county requires conformity with Health Department regulations precedent to subdivision approval, the actions of the Department are subject to administrative scrutiny and upon a limited review by this Court.

The Court finds that the provisions of the regulations in effect at the time the drainfield was approved control the locating of the well on the Gibson's property. It matters not whether the digging of the well preceded or followed the construction of the drainfield. To the extent the commissioner's finding differ from that of the Court's, it is so modified. When the drainfield was the constructed, there had been no special exception cited to the regulation in effect, that would support a variance upon a showing of an absence of evidence of a threat to public health or the environment. Similarly, the grandfather provisions of a later regulation cannot be used to give perpetual existence to an activity, where the life of the permit sought to be continued is specifically limited in time.

The Court will affirm the remaining findings of Dr. Burns. This Court may not compel the Health Department to commence proceedings against the Gibson's or the original applicant, and declines to do so. Similarly, this Court finds that the enforcement of the regulations is a matter resting within the sound discretion of the Health Department. Although this Court may exercise oversight of this case, it may not subdivide the property and will not mandate the steps required to obtain subdivision approval.

Although Ms. Leighton is entitled to a finding with respect to the validity of the actions of the Health Department, such a determination may only serve to guide those who seek or those who would approve any future subdivisions of the property. Ultimate approval of the subdivision or enforcement of the regulations of the Department of Health lies outside the jurisdiction of this Court to mandate.

Ms. Leighton may draw a Final Order in this case, to which the parties may note their exception.

Entered this 11th day of January 2001

(Signature)
Thomas D. Horne, Judge

Rule 1:13
Endorsements